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No. 06-379

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

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EMILY ABEL WAGNER, *Petitioner*

versus

THE BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE,
ROBERT MATHEWS, IRVING LANE, *Respondents*

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On Petition For a Writ of Certiorari
To The Court of Appeal of Louisiana,
First Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There would have been no case if Respondents (Hereinafter Respts.) had provided a legitimate academic basis for their decision to expel Petitioner Emily Wagner (Hereinafter Wagner). This they did not do. Even in Respts.' Opposition Brief, except for unsubstantiated hints that her skills are deficient, no evidence was offered to justify Respt. Lane's (Hereinafter Lane's) conclusion that Wagner was not "worthy" or less worthy than other similarly situated graduate students, each allowed as much time as needed.

A. Under The Due Process Clause, Petitioner Wagner Earned the Right to Objective Review by the Dean and to be Told the Legitimate Academic Basis For Expulsion.

Wagner contends the seven year limit as stated in the LSU Graduate Catalog is void for vagueness because it prescribes neither a procedure to determine eligibility for an extension nor fundamental criteria to determine who is worthy of more time. Even under this vague rule, the Dean clause grants the graduate student the expectation that before she is discharged, she has the right to objective evaluation by the Graduate Dean John Larkin (Hereinafter, Larkin) who is responsible for fairly and equitably deciding which extensions he will grant.

In Wagner's case, Lane went to a great deal of trouble to ensure that Larkin would never review her 2001 request for extension.[1] He did this because he knew that if Larkin

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[1] In 1999, Lane consulted with Larkin to find out how he could prevent Wagner from requesting a 2001 extension (Larkin Deposition, Page 73, Lane Deposition, pages 25-28, 32). Lane followed Larkin's directions by requiring Wagner's committee to sign a pledge that "we also agree that if she does not complete her degree in that period, we will not support a further request for more time." (Larkin Deposition, Exhibit 5). To ensure Wagner would be dismissed, Lane also required her to sign what amounts to a confession of judgment (Larkin Deposition, Exhibit 6). In January 2001, Lane confiscated the new petition requesting an extension completed by Mathews and signed by her committee (Larkin Deposition, Exhibit 14). Lane then bullied Wagner's committee into withdrawing the

objectively evaluated Wagner, Larkin would have granted the 2001 extension. Lane never taught Wagner and he testified that he ignored Mathews' opinion about her "worth."

B. Wagner Did Not Receive Due Process.

Respts. assert that Wagner received due process because she met with University officials after she was expelled. They ignore the fact that the fundamental requirements of due process cannot be met unless the aggrieved party is informed of the reason(s) for the deprivation. Even now, 5½ years after Wagner's expulsion, the reasons Respts. give to justify her expulsion are that Lane concluded she was not "worthy" [2] of more time.[3] Such vague conclusory statements cannot be disproven since by nature, such statements are reflections of prejudices within the mind of the speaker.

Though LSU's PS-48 states it applies to **all** student grievances,[4] LSU did not follow this grievance procedure because they did not give Wagner the required **reason** for the decision to dismiss her.[5] Even if Respts. have an academic reason for Wagner's dismissal, the fact that they did not inform her of that reason violated her due process rights.

C. The Seven Year Limit is "so vague and indefinite as really to be no rule or standard at all."[6]

Respts. first state that the seven-year time limit does not strip a participant of his rights and then contradict that statement by stating it is simply an "affirmation that the

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January 2001 petition letter so they would not botch his **careful and deliberate** plan to deny Wagner the opportunity to complete her education (Lane Deposition, Pages 31-37).

[2] Respt.'s statement that Lane concluded Wagner was "mediocre" is not supported in the record.

[3] *See* D below for a complete discussion.

[4] Lane Deposition, Exhibit 30, Page 2. Note the PS-48 lists two exceptions but neither exception relates to this case.

[5] Lane Deposition, Exhibit 30, Page 5.

[6] *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 128 (1967).

Graduate School has the authority to extend the time-limit."[7] Obviously, those whose time-limit is not extended are thereby "stripped of their rights."[8] Note that by citing *Boutilier* as authority, Respts. equate Petitioner, a United States citizen, to Mr. Boutilier, an alien trying to return to the U.S.[9] In the *Boutilier* decision, the Court affirmed the complete discretion of Congress to establish "classifications and criteria for admission that would fail to pass constitutional muster if applied in a domestic context."[10] However, unlike the INS in the *Boutilier* decision, Lane and Mathews as representatives of LSU **are** "persons" subject to U.S. 42 § 1983 and are prohibited from depriving Wagner of rights, privileges, and immunities secured by the Constitution and Louisiana laws.

Respts. similarly err in relying on *Finley*.[11] In the *Finley* case, the NEA acted as a patron by exercising its prerogative to fund projects in a competitive bidding process to distribute limited resources. In contrast, graduate students subject to the seven-year limit are part of the University Community without which LSU would not be a research university. Those allowed to complete their studies are not recipients of a "gift." A graduate student who selflessly conducts research to benefit the University and advancement of knowledge with no expectation of any gain except the chance to earn a Ph.D. is not a recipient but is instead a patron.

Further, no scarce resource is being competitively distributed here. Instead, Respts. are squandering a scarce

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[7] *Brief in Opposition to Petition for a Writ of Certiorari*, Page 15.

[8] *Boutilier* at 128.

[9] When the affected person is neither a citizen of the United States nor under the jurisdiction of a political sub-entity of the United States the INS is not required to follow U.S. 42 § 1983.

[10] Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?* 39 Colum. J.L. & Soc. Probs. 223, 228 (2005).

[11] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

resource, the student and her completed research.

Finally, dismissing students without an academic reason cuts off the very competition to excellence that is the hallmark of a graduate education. The NEA's mandate is to advance artistic excellence. In contrast, Respts.' seven year limit does not even reference academic excellence. "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'"[12]

In this case, Respts. used their vague and variable seven-year limit to eject Wagner, a graduate student in good standing, while retaining others who were similarly situated. Contrary to their assertion, Respts. were acting as sovereign in the worst sense of the word.[13] The only evidence Respts. give for their contention that they are not sovereign are the guidelines written by Dean Larkin.[14] However Larkin withheld these guidelines from Wagner until after discovery ended. Further, Larkin ignored his guidelines in the Norah Thurman case,[15] contradicting Respts.' contention that the guidelines in any way fetter the dean's discretion.

D. Wagner was Treated Arbitrarily.

Though Wagner was never given a substantive reason for her dismissal, Respts.' attorney creatively articulated

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[12] *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25 (D.C. Cir. 1997).

[13] A sovereign is "A person, body, or state vested with independent and supreme authority." Bryan Garner (Ed.) Black's Law Dictionary, p. 1401, West Group, 1999.

[14] Larkin deposition testimony, Page 33.

[15] *Thurman v. Board of Sup'rs of Louisiana State University and Agr. and Mechanical College*, 02-0599 (La. App. 1st Cir. 7/15/02), *writ denied*, 538 U.S. 925, 3/24/03. *writ denied*,--- S.Ct. ----, 2006 (U.S., 10/2/06). (Referenced letter is dated June 4, 1999 and is marked A-203, Plaintiff's Exhibit 18 and page 2 is marked A-204).

"reasons." Thus, Respts. Attorney asserts that Wagner was not treated arbitrarily because she

> made extremely poor progress during the allotted seven years, her own major professor felt she lacked "basic research and writing skills," the Chair of the department [Lane] felt that her performance in the program was "unsatisfactory" and "poor," she signed an agreement that was crystal clear and utterly unambiguous that her first extension of time was her final opportunity to obtain her degree, and she failed to complete the academic requirements for her degree even after *eight* years.[16]

The first point regarding "poor writing and research skills" is not taken from any sworn testimony but instead is taken out of context from the December 7, 1999 letter (which includes the non-renewal pledge), which Mathews wrote under Lane's order and which actually concludes that Wagner's writing and research improved. The statement is:

> I attribute Emily's slow progress through the program to two main factors, her lack of basic research and writing skills and her working full time during her entire period of graduate training. While Emily was slow to acquire these skills, the quality of her work on her General Exam persuaded her committee that she could possibly complete the Ph.D. within the extra time requested.[17]

In Mathews' sworn trial testimony, he denied that the reason for Wagner's dismissal related to her research skills.[18]

Next, Respts.' attorney claims that Lane "felt that her performance in the program was 'unsatisfactory' and 'poor.'" If feelings, **without more**, are competent evidence sufficient

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[16] Resp.'s *Brief in Opposition to Petition for Writ of Certiorari*, Page 17.

[17] Larkin Deposition, Exhibit 5.

[18] Trial Transcript, Page 634.

to justify dismissing a student, then no students are safe from arbitrary treatment. Actions solely on the basis of "feelings" are a hallmark of arbitrary action.

The "final" statement to which Respts.' attorney next refers from the Timeline is neither clear nor unambiguous, nor does it state that this would be Wagner's "final opportunity to obtain her degree." Respts.' attorney creatively added words to those in the Timeline to convey Respts.' intended meaning but that is not what the words say.

Finally, Respts.' attorney justifies Wagner's dismissal by stating that Petitioner had "failed to complete the academic requirements for her degree even after *eight* years." This same statement could be applied equally to each and every one of the 62 students identified as being allowed between 9 and 14 years to complete their degree requirements.

E. Respondent Lane's Egregious Conduct Was Unprofessional and Violated Wagner's Liberty Interest.

Respts.' argument that Lane was justified in expelling Wagner due to concerns about the Department's standing in the University is a perversion of the record. Lane's concerns about standing were that he was protecting Wagner's committee from being "embarrassed" about seeking an extension for Petitioner in 2001 because they had signed the 1999 pledge that they would not ask for another extension for Wagner.[19] Lane stated:

> **Lane:** I had an ethical and moral responsibility, as far as I was concerned, to show them [petitioner's committee members] what they did to protect them, to protect the department, to protect the integrity of the whole operation. But I still-- I would have had, no matter what, to give my opinion on that, and then it [2001 petition, Larkin Deposition, Exhibit 14] would

[19] Note that this was the same December 7, 1999 document (Larkin Deposition, Exhibit 5) that Lane required committee members to sign before he would allow the first petition to be forwarded to the Graduate School.

> have gone up [to the graduate school]. But that's sort of saying that, you know, the contract that had been signed [Larkin Deposition, Exhibit 5], the verbal agreements and everything, should all be ignored because people forgot. It doesn't make sense to me. . . . . I was protecting them [committee members], because they had signed one thing, they had made a contract, they had basicly pledged their word, and now they were doing something that contradicted that. I wanted them to be aware of that.
>
> **Question:** *So you are saying that you were protecting them [the committee] from something bad that would have happened as a result of them signing that?*
>
> **Lane:** I think they would have been embarrassed. Now whether you want to think that's bad or not, you have to make that decision.[20]

Lane's concern for his personal "standing" and his concern about the personal "standing" of committee members omits any concern for Wagner's "standing" or the University's "standing." Apparently Lane believes committee members' need to avoid embarrassment outweighs Wagner's academic career or her perfectly good research, which could have increased the Department's standing both in the graduate school and in relation to other universities. Since Lane voiced no academic concerns, perhaps Mathews is right, that this is just a game, "the only game in town." There is no balancing of interest in Lane's calculus.

The Ph.D. graduate student's primary consideration for spending long hours of reading and research and complying with any and all requirements is the promise of an opportunity to earn a Ph.D. The graduate student's "standing" is her **liberty interest** and is at the heart of a graduate education. Otherwise, graduate school would be a fool's errand. This is

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[20] Lane Deposition, Page 218-219.

especially true if she is at the mercy of tyrannical administrators who are traditionally empowered by the courts to arbitrarily expel her for any reason or no reason. "The courts have not yet decided the liberty or property interest question."[21] This results in harm to the student. Yet, the very act by graduate students of filing suits to question university decisions impact their liberty interest by "cast[ing] a cloud upon a student's name, especially in a graduate-degree program."[22]

In this case, because Louisiana Courts rubber-stamped Respts.' acts, Respts. can be confident in this dismissal even though they have neither considered academic standards, nor followed their own procedures. Until the Court recognizes graduate students' liberty interests, they are a "peculiar institution," truly at the mercy of their university's unfettered discretion.

The present case is analogous to the *McElroy* case in which the Court accepted the taking of a cafeteria worker's security clearance, and thus her job, based on the **opinion** that she failed to meet security requirements.[23] The Court speculated her loss of security clearance could have been related to her being careless with her identification badge.[24] In Justice Brennan's dissent, he stated, "She was excluded as a 'security risk,' that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find

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[21] Steven Milam & Rebecca Marshall, *Impact of Regents of University of Michigan v. Ewing on Academic Dismissals from Graduate and Professiona*l Schools, 13 J.C.& U.L. 335, 336 (1987).

[22] Dina Lallo, *Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?*, 18 J.C. & U.L. 577, 593 (1991).

[23] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 898, 81 S. Ct. 1743, 1750 (1961).

[24] *McElroy* at 899.

out."[25] Just as the McElroy Court accepted the Navy's conclusory statement about the cafeteria worker, so the Louisiana courts accepted Lane's conclusory remark about a graduate student. National Security is unharmed when courts look past their traditional prejudices, and courts thus have no need to "console" themselves with convenient fictions.

F. Wagner Correctly Interpreted the Handbook.

The nine-year limit in the Department's Handbook[26] is clearly stated and is not ambiguous. The same Respts. who tell us to ignore the Dean's role that is stated in the Graduate Catalog also tell us to ignore the department's role under their own nine-year limit. A nine-year limit means there must be a genuine academic reason to truncate the nine years. Respts. rely on an Alice in Wonderland mentality where words do not say what they mean but instead say what Respts. say they mean. Respts.' statement that nine years is the maximum time allowed is also contradicted by evidence that two Cognitive Psychology graduate students were each allowed ten years to complete the Ph.D.[27] Neither of these students would have finished if they had been discarded after eight years.

G. Respondents' Description of Lane's Conspiracy Bears a Strong Resemblance to an Unconstitutional Cognovit.

Respts. claim "Ms. Wagner was not forced to sign away any rights, nor did she waive notice of anything."[28] What Respts. are saying is that Wagner had no rights and therefore, she could not sign away any rights. Since she had no rights, she was not entitled to notice and therefore the fact that she received no notice was irrelevant.

The Timeline statement "**This** extension [not any other extension] of one year to complete all requirements for my

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[25] *McElroy* at 901.

[26] Lane deposition, Exhibit 23, Page 8.

[27] Larkin deposition, Exhibit 4.

[28] Resp.'s Brief in Opposition to Petition for Writ of Certiorari, Page 2.

degree, if granted to me by the graduate school, **is final"** is not equivalent to the attorney's statements: "She simply agreed that the first extension of time would be her last;"[29] that " if she failed to attain her degree within the one additional year, she would not be granted any further extensions of time;"[30] or that "her first extension of time was her final opportunity to obtain her degree."[31] Although these words in Respts.' brief and words in the December 7, 1999 petition convey Lane's intentions, these words are not included in the Timeline and Wagner did not read the December 7, 1999 petition until after her dismissal.

If we accept Respts.' repeated assertion that what Wagner signed meant what they intended it to mean and that she agreed, the events conform perfectly to the qualities inherent in a cognovit.[32] Thus, bargaining was unequal and she received no consideration for giving up her rights. She was forced, in advance, to give up the right to notice before she was expelled as well as any chance for a second extension.

CONCLUSIONS

Respts.' actions in expelling Wagner exceed the guidelines established in *Horowitz* and *Ewing* which require a legitimate academic basis and notice before a graduate student is dismissed. The Supreme Court should grant this writ to clarify the permissible parameters within which academicians can dismiss students and to give students assurance that arbitrary dismissals are unacceptable.

Respectfully submitted

Emily Wagner

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[29] *Opposition* at 21-22.

[30] *Opposition* at 2.

[31] Opposition at 17.

[32] *D. H. Overmyer Col. Inc. V Frick Co.*, 405 U.S. 174.